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No. 515

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

RICHARD R. HARSHMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF OF PETITIONER.

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OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is printed on pp. 66, 67 of the Transcript of Record (R 66, 67), and is reported at 307 F. 2d 590 (1962).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 20, 1962 (R 66). Petition for Rehearing was

denied on September 14, 1962 (R 68). The Petition for a Writ of Certiorari was filed on October 15, 1962, and was granted on December 17, 1962 (R 68).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), also Rule 37 (b) and 44 (a) F.R. Crim. Proc.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

The constitutional provisions, statutes, and regulations involved are set forth in the appendix, *infra*, pp. 1a-8a.

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether the Court of Appeals correctly ruled that this Courts decision in *Dickinson* v. *U.S.*, 346 U.S. 389, 74 S.Ct. 152, applies only to cases which involve "ministerial status."

II.

Whether the Courts below correctly ruled that there was a *basis in fact* for the denial of petitioner's exemption as a conscientious objector to both combatant and noncombatant service on the ground of religious training and belief, on the sole ground that he was employed in a candy factory as a salesman, a small part of the products of which factory was purchased by the Armed Forces.

III.

The Local Board before which petitioner was classified, did not consider it fair to other registrants to grant to anyone a conscientious objector classification, exempting them from combatant and noncombatant service. That Board granted petitioner exemption from noncombatant

service only, even though acknowledging the sincerity of his claim. The Appeal Board classified the petitioner *de novo*, but gave him the same classification as the Local Board did. Did the Appeal Board's classification of *de novo* overcome the Local Board's illegal conduct and petitioner's deprivation of due process?

IV.

Was it a prejudicial error by the Trial Court, notwithstanding of the Court of Appeals' holding to the contrary, to prevent petitioner from presenting evidence attempting to overcome the Government's *ex parte* statement, alleging that the company that employed petitioner was manufacturing implements of war.

V.

Was it a prejudicial error on the part of the Trial Court, notwithstanding the holding of the Court of Appeals to the contrary, to permit the Government to place into evidence petitioner's Selective Service file and permit the same to be taken by the jury and at the same time depriving petitioner of the opportunity to offer evidence explaining the contents of the Selective Service file.

VI.

Did the Trial Court commit a prejudicial error, notwithstanding the Court of Appeals' holding to the contrary, to refuse an order requested by petitioner to have the Hearing Officer's report produced when the Department of Justice's recommendation addressed to the Appeal Board referred to such Hearing Officer's report, and when petitioner challenged the truthfulness of such recommendation as it was based on the Hearing Officer's report.

STATEMENT OF THE CASE.

A one-count indictment filed in the United States District Court for the Northern District of Illinois, Eastern Division, charged petitioner with refusal to obey the order of induction of his Local Board of the Selective Service System, No. 177, Sullivan, Illinois, in violation of Sec. 462, Title 50, App. U.S.C. (R 2, 3). On his plea of not guilty, following a trial by jury, he was found guilty (R 59). He was sentenced to two years and six months imprisonment and to a fine of $1,500.00 and cost of prosecution (R 62). On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment was affirmed (R 67).

The trial proceedings may be summarized as follows:

1. After identifying it, the Government offered into evidence petitioner's Selective Service file. Petitioner objected to many of those documents on the ground that the draft board clerk identifying the file, Exhibits B-1-69 (SR 2-81), was not shown by the government to be the custodian of the records (R 12). On cross-examination of government witness draft board clerk, her attention was directed to the Index and the entry therein concerning the Department of Justice recommendation and she was asked whether the Hearing Officer's report or a résumé thereof is in the file. The government objected to the question and the objection was sustained (R 13).

Government witness Schuttler, Deputy Commanding Officer of the Induction Center in Chicago, testified (R 14 to 19) as to the appearance of petitioner at the Induction Center on November 19, 1958. The petitioner was asked

"if he will refuse and he said yes" (R 15) on the ground that he is a conscientious objector; that the witness was required to go through a prescribed ceremony to give the petitioner a chance to refuse officially. The witness explained the ceremony "whether he should step forward or whether he should not step forward at a given signal" (R 16). When Petitioner was told to take one step forward indicating his induction into the armed forces of the United States, petitioner remained standing and thereupon the witness reported petitioner's refusal to the United States District Attorney in Chicago (R 16).

On cross-examination, this witness testified that his duties are to supervise induction of those people who are physically, emotionally and morally fit for induction (R 17). The witness described the procedure to induct physically, emotionally and morally fit people into service (R 17-18).

Whereupon the government rested (R 19) and a motion for judgment of acquittal was presented, which motion was denied (R 19).

Petitioner called draft board clerk Kennedy as his witness. Because of the government's objections, and the objections being sustained by the trial court she did not answer the following questions: whether the last three pages of the ten-page questionnaire were part of government Exhibit B-1 (SR 3) when the same was handed to petitioner; whether the witness, as a draft board clerk, reviewed the regulations of Selective Service as they pertain to keeping and making a registrant's files; whether every document that is placed in the registrant's file is noted in a summary or in an index; whether there is any reference made to Government's Exhibit B-40 (SR 77) in the index; whether Government Exhibit B-8 (SR 39 to 44) was given or sent to petitioner; what is Govern-

ment's Exhibit B-26 (SR 59); whether there is a second letter from the Hearing Officer referred to in Government Exhibit B-36 (SR 66 to 72) (R 20 to 22).

A motion was presented on behalf of petitioner for an order upon government to produce Hearing Officer Brittingham's second letter referred to in T. Oscar Smith's second letter included in the file as Government Exhibit B-36 (SR 66 to 72) and the motion to produce was denied (R 22 to 23).

Thereupon a motion was presented on behalf of petitioner that the court order the government to produce for the perusal of the court *in camera*, the Hearing Officer's report referred to in Government's Exhibit B-36 (SR 66 to 72) for the purpose of the court determining whether the same is pertinent or relevant. The motion was denied (R 23).

Thereupon a motion was presented that the court order the production of Hearing Officer Brittingham's second letter referred to in Government's Exhibit B-36 (SR 66 to 72) under the decision of the Supreme Court of the United States in the *Gonzales* and *Watkins* cases. Motion was denied (R 24).

Defense witness Kenney was asked whether she, as a clerk of Local Board 177 ever heard a draft board member express an opinion as is set forth in Government Exhibit B-8 (SR 39 to 44) that he doesn't believe that there is any such thing as a real conscientious objector, to which question the government objected and the objection was sustained. This defense witness was asked whether she, as a clerk, heard any draft board member express an opinion similar to that contained in Government's Exhibit B-8 (SR 39 to 44) that any person who lives in America should be willing to fight for his country whether or not he is by religious training and belief opposed to partici-

pation in war, to which question the government objected and the objection was sustained (R 24-25). The witness was asked whether Local Board 177, while she was a clerk ever gave anyone a classification of 1-O, to which question the government objected and the objection was sustained.

Felix Hagerman was called as a witness for petitioner however, when he was asked whether he holds any office in the Church of Jesus Christ, Sullivan, Illinois, the government objected. Defense counsel explained that the purpose of the question is to present evidence since the government's Exhibits charged that the church was manufacturing certain war goods, and this witness, if he qualifies, would be able to say whether that evidence is true or false. The government objection was sustained (R. 25-26).

Because of the objections of the government and the trial court sustaining the objections, this witness could not answer the following questions: whether or not he has theretofore seen government's Exhibits B-3 (SR 16 to 19), B-4 (SR 20 to 38), and B-5 and B-24 (R. 26).

The witness had seen government's Exhibit B-41, however, objection was made to any reference to the Hearing Officer by the name of Brittingham mentioned in that Exhibit and the objection was sustained. So was the objection to the question whether this witness while he, pursuant to authorization, inspected petitioner's Selective Service file, saw a report therein by Hearing Officer Brittingham. Objection was made and sustained to the question whether this witness appeared with petitibner before Hearing Officer Brittingham (R 27-28). Objection was made and sustained to the question whether the witness appeared with petitioner before the local board.

This witness was connected with Community Industries for approximately 15 years. He is the Executive Vice President and Treasurer. When the question is asked whether he knows the products which were manufactured by the company in the last 15 years there was an objection by the government and the objection was sustained and the answer was stricken and the jury was directed to disregard it (R 29). The witness is acquainted with the tenets of the Church of Jesus Christ of Sullivan, Illinois, however, the question whether a member in good standing could even manufacture ammunition was objected to and the objection was sustained (R 29).

Witness knows that petitioner is a member in good standing of the Church of Jesus Christ, that he participates in the work and worship of the church. The witness, because of the objection of the government and the sustaining of the objection, could not testify as assistant pastor of the church as to the regular service thereof (R 29).

Whereupon, petitioner made an offer of proof to the effect that if witness Hagerman had been permitted to answer questions directed to him, he would have testified that as Executive Vice President of Community Industries Ltd., he knows that it was and is a manufacturing company and that the church never participated in the manufacturing process in any form. That the manufacturing company made candies, ladies' dresses, tents, garden tractors, snow removing tractors, and such things. That Community Industries never manufactured any war goods. All items were manufactured for civilian purposes. Candy could be and was used by the government in survival kits. It is true that some of the dresses were purchased by the government. It is possible, though the witness has no information about it, that some of the garden and

snow removal tractors which were sold to distributors throughout the country may have been purchased by the government. None of these items were manufactured by the church either directly or indirectly. That he understands the teachings of the church and no member of the church in good standing would ever manufacture items used solely for destructive purposes. That no member in good standing, and petitioner is a member in good standing, would manufacture bullets, machine guns, tanks, poison gases, submarines or other destructive items (R 30).

The government objected to the offer of proof and the objection was sustained (R 30-31). Whereupon, the following colloquy took place outside the hearing of the jury between counsel and the court:

> "Mr. Bittman: Your Honor, I again make an offer to Mr. Heisler if he would like to question this witness before the Court on these issues and give the Government an opportunity for cross examination outside of the presence of the jury, the Government would have no objection.
>
> "Mr. Heisler: I would like to say, your Honor, that Mr. Bittmman's statement that 'I again make this offer' is not based on facts because this is the first time that I heard him making any such offer, and I don't want the record to stand that he again makes this offer.
>
> "The Court: What would be the purpose of having counsel for the defendant do that?
>
> "Mr. Bittman: I believe that in Mr. Heisler's offer of proof he makes some statements which I do not believe to be a fact.
>
> "The Court: I think some statements in the offer run counter to certain Government exhibits which have been admitted into evidence, which exhibits are signed by some representative of the church.

"Mr. Bittman: That is correct.

"The Court: But I am not trying this man's classification *de novo*. My obligation was to examine the file as it has been admitted into evidence and to determine whether there was a basis in fact. Now I can't see how it would profit us, to get into a dispute here as to whether this witness is right as against some statements that might have been made in the exhibit.

"Mr. Bittman: The Government objects to this testimony going before the jury.

"The Court: It isn't a matter of his testimony, it is a matter of those questions which have been asked and as to which objections have been sustained, and considering the so-called offer of proof, the Court has sustained the Government's objection to the offer.

"Mr. Heisler: I understand, your Honor, that the Government withdraws then the offer that is on the record?

"The Court: About the offer, do you mean the offer to ask these questions outside of the presence of the jury? What would be the purpose of it?

"Mr. Heisler: No, I thought that he withdrew it.

"Mr. Bittman: I withdraw that, although I would say that my basis of objection to the offer of proof is on the basis it is not for jury determination.

"The Court: I don't think it is necessary to have the answers to the questions where the questions themselves are palpably objectionable.

"Mr. Heisler: If your Honor please, just to be sure that I understand the Government's position, I believe that there would be a purpose and therefore I suggest that I should be permitted to ask these questions after the Court sustained objection to the offer of proof.

I can ask the question before the Court.

"The Court: For what purpose?

"Mr. Heisler: So the Court can determine whether or not there is a basis of fact in the record.

"The Court: Oh, no. I considered the basis in fact on the Selective Service file.

"Mr. Heisler: I understand that, your Honor. (fol. 37).

The Court: I am not going to let some outside witness, for example, the the witness now on the stand, by extraneous statements determine whether there is a basis in fact.

"Mr. Heisler: . . . assuming now, your Honor, that the Court would find that some of these exhibits, Government exhibits, are patently false, but they are in the file, does that mean, your Honor, that the Court feels that even then the Court cannot go beyond the Government's exhibits?

"The Court: I will stand on my ruling."

Whereupon witness Hagerman testified that he knew petitioner nearly all his life and that his reputation in the community of Sullivan, Illinois is excellent (R 32).

Whereupon petitioner testified that he lives in Sullivan, Illinois where he was born 26 years ago; that he is the great-grandson of the founder of the Church of Jesus Christ whose name was Samuel Rufus Harshman and that the present pastor's name is Leah L. Harshman and he is her great nephew. That there was another minister by the name of Joel Richard Bradley and petitioner is his grandson on his mother's side. He has been a member ever since he was 15 years of age and he attends church regularly twice a week, so do his parents and his three sisters all of whom are members of the church. That Government Exhibit B-1 (SR 3 to 10) is a questionnaire that he filled out. On page 4 thereof (SR 5) he stated that his job was to "assemble piece

goods from cutting table in dress factory", which manufactures ladies' ready-to-wear and is part of the company known as Community Industries. As the material was cut out in thicknesses from 2 to 250 pieces, his job was to number the individual pieces so that they may be properly assembled. Petitioner worked in the dress factory after school and on Saturdays and whenever he was free while a freshman in high school. He worked full time in the summer. During that time he recalls three manufactured items which he assembled, namely, cook's coats, mattress covers and cooling suits made of perforated material. He also worked in the garden tool division of the Community Industries after school and during one summer. At the present he is employed in the candy division. While working in the garden tool division they manufactured a two-wheel tractor consisting of a power unit and four or five attachments such as rotary mower, disc and snow plow. The three divisions of Community Industries are the George Garden Tool Division, The Felicity Fashions Division and the Lucy Ellen Candy Division. He went to work for the candy division after school in his senior year. His first job was that of a janitor, cleaning up sweeping and mopping the starch. Then he was feeding chocolate bars into the enrobing machine. Then he worked on the sanding machine that puts the outside coat of sugar on the candy. After about six months, he was assisting the buyer of raw materials. Then when he finished his school he was asked to become a part of the sales force of the candy factory. He is now a factory representative with the title of District Sales Manager. In his work he applies the sales plans in a given area and represents the factory with the candy brokers who do the direct selling in their area. He has had this job for four years (R 33 to 35).

The government objected and objection was sustained to the question whether petitioner did, in four years, ever sell candy to the armed forces of the United States.

Petitioner continued with his testimony to the effect that he signed page 7 of Government Exhibit B-1 (SR 7) whereby he requested a special form for conscientious objectors. He also stated on the form that by reason of his religious training and belief he is conscientiously opposed to participation in war in any form. He received the special form which is in evidence as Government Exhibit B-2 (SR 11 to 15). He submitted the same to the draft board after completion. In this form he struck out the claim for exemption from noncombatant service only and validated the claim for complete exemption. After that he received a classification of 1-A-O which he learned meant entering the armed forces in a noncombatant capacity. He appealed to the appeal board but before that he appeared personally before the draft board. After that he prepared a summary of a discussion that he had with the draft board and this discussion is in Exhibit B-11 (SR 45 to 47). He remembers draft board member Clancy with whom he had a conversation (R 35-36). The government objected and the objection was sustained when petitioner was asked to relate the conversation that he had with board member Clancy (R 36).

Petitioner was not permitted to answer the questions what he learned from Exhibit B-11 about the law pertaining to conscientious objectors; whether he was instructed to appear before a Hearing Officer known as Francis Brittingham. Government objected to the questions and objection was sustained (SR 36).

Petitioner then testified that he signed the statement which is in evidence as Government Exhibit B-17 (SR

51 to 54). Petitioner read Government Exhibit B-36 (SR 66 to 72) wherein on page 2 reference is made to a prior report of the Hearing Officer that was made in 1954 (SR 70) where it is stated that the Hearing Officer concluded that petitioner is not entitled to 1-O classification because the company that employs him is producing material for military consumption (R 37). The government objected and objection is sustained to the question whether petitioner had seen anything like that in the Hearing Officer's report. Objections were made and sustained to the following questions: In Exhibit B-36, the Assistant Attorney General says that "The registrant—meaning you—stated that it is not a violation of their Christian duty to manufacture goods for military consumption. Did you ever make such a statement . . ." Another question was unanswered where the petitioner was asked whether petitioner would be willing to be employed in a plant which manufactured guns. Still another one that was left unanswered was one based on the assumption that Community Industries would suddenly turn to the manufacture of candy bars impregnated with bacteria to be handed out to our enemies, whether petitioner would be willing to work for the company (SR 37).

Whereupon petitioner offered proof (R 38 to 41) that if he would have been permitted to answer the questions to which objections were made and sustained, he would have testified that Government Exhibit B-36, the letter of the Assistant Attorney General (SR 69 to 72) is false in the following particulars: It is not true that the Hearing Officer in 1954 concluded that in view of petitioners's employment with a concern producing material for military consumption he thereby failed to sustain his claim for exemption. This letter is false when

it states that the Department of Justice concurred with the Hearing Officer that he be given 1-A-O classification because to the contrary the Hearing Officer in that prior report accepted the recommendation of the Department of Justice that no member of the Harshmanite church can be given 1-O classification. Oscar Smith's letter is false in the further respect when it states that petitioner expressed an opinion that it is not a violation of his Christian belief to manufacture goods for military consumption, in fact, no such question was asked of him by the Hearing Officer or anyone else. Similar questions were asked of him and he answered that the company that employed him for the past 8 years never manufactured anything other than goods for civilian consumption although a small part of it may have been purchased by the government. That the Smith letter is further false when it states that petitioner said to the Hearing Officer that he doesn't accept responsibility for actions of persons who use such products. That such question was not asked of him but a similar question was asked and answered by him to the effect that his employing company is manufacturing civilian goods and that nothing could be done in this country by a person who would refuse to make anything that could not be used for military purposes. He could not raise corn because corn pone could be fed to the armed forces (R 38-39). The offer of proof further stated that petitioner would have testified that he would, under no circumstances, engage in the manufacture of any war materials such as bullets, tanks, poison gases because that would be contrary to his belief and it would be contrary to his mission on this earth. That he accepted the teachings of the Church of Jesus Christ of Sullivan, Illinois, and that in accordance with such teachings he cannot accept the noncombatant service because of the

New Testament injunction "love your enemies". That he knows from his own knowledge, from his parents and from his pastor that the Church of Jesus Christ never manufactured any merchandise either civilian or military, it being a spiritual organization which never did nor does not now own a manufacturing establishment. That his employing company is an Illinois corporation owned by stockholders and during his eight years employment with that company it was engaged solely in the manufacture of civilian goods. He does not know whether the mattress covers which he helped manufacture were purchased by the army. He doesn't know whether the cooling coats or any of the candy he was working on was purchased by the army but it could have been (R 39-40).

The offer of proof further said that petitioner in the four years that he was engaged as a salesman he never sold any candy to any military authorities or to the government. All his customers are civilian establishments such as groceries and chain stores. That he as a good church member owes the government any service that it might demand that does not involve personal participation in the act of war (R 40).

That on December 19, 1955, he appeared before his draft board personally and asked that he be given a 1-O classification because under the law he is entitled to it and because he made out his case and the draft board never doubted his sincerity and honesty. When the board denied him his classification he asked for the reason thereof. One board member, Saxton, answered that as far as he was concerned there was no such thing as a conscientious objector opposed to both combatant and noncombatant service and the acting chairman of the board told him that to get the classification of 1-O,

petitioner would have to leave the country and that the best place for him to go would be Canada. When he asked the board members whether they believed in his sincerity as a conscientious objector they unanimously stated that they certainly did (R 40-41).

The offer of proof further stated that when petitioner first appeared before Hearing Officer Brittingham in 1954 he was told that the Hearing officer would give him 1-O classification but pursuant to a letter that Brittingham received from T. Oscar Smith he is precluded from granting to him or any member of the Harshmanite church 1-O classification. Mr. Brittingham expressed a great deal of sympathy and understanding for the position of petitioner; that he believed in his sincerity, honesty and integrity and that while Brittingham believed that there ought not be a 1-O classification, as long as there is one the same ought to be given to petitioner and to other members of his church.

Petitioner would have further testified that the same statement was made to him by Hearing Officer Brittingham during the second hearing in 1956 contrary to the statement made by Smith in Government Exhibit B.36 (SR 71) (R 41). The government objected to the offer of proof and the objection was sustained (R 41).

Petitioner then further testified before the jury that he heard Captain Schuttler testify as to the induction ceremony. However, because of the objection of the government and the court sustaining the objections he was not permitted to answer the question whether he, when he remained standing and thus refused induction intended to violate any of the laws of the United States and what prompted him to remain standing when he did so at the induction center. When he was told by Captain Schuttler

about the penalty which may be attached for his remaining standing what prompted him to do so nevertheless; whether during his 26 years of life he ever violated a criminal law of the state of Illinois or of the United States (R 42-43).

Thereupon petitioner offers proof that if he would have been permitted to answer the question he would have stated that by taking the step forward at the induction center he would have violated his Christian conscience; that he remained standing pursuant to the command of the Lord. The government objected to the offer of proof and the objection was sustained (R 43).

On cross examination petitioner testified that he wrote Government Exhibits B-11 and B-12 (SR 45 to 47) and (SR 48 to 50) he mailed a number of letters to Selective Service and they were never returned to him. He was classified 1-A-O and that he knows to be for members of the armed forces in noncombatant service; that that is one of the two conscientious objector classifications and the other is 1-O. He was always classified 1-A-O. He received an order to report for induction and he reported. Government Exhibits B-60 (SR 79) shows the induction date as November 19, 1958.

He had a conversation with Captain Schuttler in his office as he testified to on direct examination. The law was explained to him twice (R 43-44). On re-direct examination petitioner, because of government's objection that was sustained was not permitted to answer the question whether at the time when he was given the choice by Captain Schuttler to step forward or not, did he believe that the classification 1-A-O given to him was given in violation of the law (R 44).

Thereupon petitioner offered proof to the effect that when he remained standing he was aware of Section 6 (j) of the Military Training and Service Act which provides that a person who, because of his religious training and belief is conscientiously opposed to participation in military service in any form, be given, in lieu of induction, the opportunity to do civilian work for 24 months. That he knew at that time, that his Selective Service file, the documents therein, his standing in his church, the conduct of his life, all proved that he was entitled to 1-O classification and that he was convinced that such classification was denied to him because the draft board, the appeal board and the Department of Justice were all biased and prejudiced against him and against members of his church, and he believed that the order of induction based on the classification given to him was not in accordance with the rules and regulations and the law, and that it was a void order and that therefore, he was not bound to obey it. Government objected and the objection was sustained (R 44).

Thereupon William Edward Rider, presently the principal of Lombard High school, Lombard, Illinois, and formerly petitioner's teacher in the Sullivan High school, testified that his honesty, sincerity and integrity is excellent. To the same effect testified Barbara Leah Harshman, a sister of petitioner (R 45).

At the close of all the evidence, petitioner moved for a judgment of acquittal on the grounds theretofore presented and on the further ground that petitioner's testimony indicates that there was no basis in fact for the classification given to him and there was no basis in fact to deny him a classification of 1-O. Further, that Government Exhibit B-36 is untruthful and that the same is based on bias, prejudice and suspicion. The court ruled that

there is a basis in fact, and therefore, petitioner's motion for judgment of acquittal was denied (R 46).

Thereupon a discussion was had in absence of the jury between court and counsel concerning the instructions. Petitioner objected to government's instructions Numbers 1, 11, 14, 18, 19, 22, 23, 24, 26, 27 and 28. Objections were overruled as to all government's instructions, except 22 which was withdrawn by the government (R. 46-47). The government objects to all petitioner's proffered instructions and the court sustained objections to G, H, I, J, K-1, K-2, L, M, N, O, P, Q, R, S with the statement that a substitute instruction will be given for S. Objection is sustained to petitioner's instructions T and U (R 47). Thereupon a stipulation was entered into as to the exception of the court's ruling pertaining to the instructions and further that a sealed verdict may be had (R 47-48).

Closing argument by the government counsel without any interruption by defense counsel (R 48). Closing argument by defense counsel on behalf of petitioner interrupted by government counsel repeatedly (R 48).

Thereupon the court instructed the Jury (R 49 to 53).

Defense's rejected instructions appear on R 53 to 58.

Thereupon the jury returned the verdict finding petitioner guilty as charged in the indictment and judgment was entered on the verdict (R 59). Thereupon, on behalf of the petitioner a motion was presented to the court for a new trial. The court offers to set aside the verdict of guilty and to dismiss the indictment provided petitioner submits to induction under the classification given to him. Petitioner answers that he cannot accept the 1-A-O classification (R 59). The trial court then states to defense counsel that it is

> "not impressed by this idealism and this excessive zeal for any particular faith when a resourceful criminal lawyer is employed to do what you have done in this case, availing yourself of every tactic to circumvent the law by flying in the face of my instructions and despite the fact, the government, with my approval, and I with the government's approval am willing to let this boy serve as a conscientious objector" (R 60).

Defense counsel offers to put in the record that he tried cases in various circuits and before many federal judges that he has tried cases of a great many conscientious objectors and "this is the only time that I (defense counsel) have ever been accused of trying to use any tactics to circumvent the law. I thought I wanted to enforce the law which I saw in this case was doubtful (R 60)."

The Court then addressed the defense attorney to the effect that:

> "Let me say on the record here that I mention it not so much in criticism of you but it seems to me that these people who are willing to pay a resourceful criminal lawyer to do what you do for them don't have the lofty ideals that they pretend to have." (R 60).

To which statement defense counsel answers:

> "It may be a surprise to your Honor that I defended hundreds of cases without any fee, so that was not the issue, and probably the court would be surprised that probably my resourcefulness was not paid in dollars and cents. But I think I was paid because I believe that I was doing the right thing, even though your Honor doesn't believe so."

To which the trial court retorts: "You don't look undernourished Mr. Heisler." (R 60).

The government objects to petitioner's motion for a new trial and the trial court stated that that question of law was fully argued, but heard defense counsel in connection with the sentence (R 61). Thereupon the court gives an opportunity for petitioner to speak on his own behalf, which he does, and he states that he will accept the judgment of the court which will be passed on him

> ". . . according to the verdict rendered by the jury, as the Lord's Will to me. I praise Him and I am still free in spirit and soul to praise Him from the bottom of my heart for the Grace and Courage to witness for Him in this Courtroom. I know that it matters not where I go because I am told that since I know I am a Son of God, I will have His Love, His Holy Spirit going with me, whether in a penitentiary or on a street, a sidewalk, or in a Courtroom, and I only am very happy and thankful for the opportunity to witness for Jesus Christ and for the salvation that He did give to mankind of which I partook.
>
> "I know that it is the Lord's Will to me and I will accept it as such, and I know that all good things, all things work together for good, to those that love the Lord, and I know that nothing can separate me from the Love of God. I can serve my Maker in jail or at work." (R 62).

Thereupon the trial court sentenced petitioner to be imprisoned for a period of two years and six months and that he pay a fine of $1,500.00 and costs of prosecution. That he stand committed until fine and costs are paid. Appeal bond was set in the amount of $5,000.00 (R 62),

Judgment, and Commitment (R 63-64).

Notice of Appeal (R 64-65).

Opinion of the United States Court of Appeals for the Seventh Circuit (R 66-67). The opinion refers to a com-

panion appeal No. 13585 entitled *United States* v. *Malcolm Lebert Parker* filed simultaneously with this case on August 20, 1962 and concludes that the court's decision in *United States* v. *Parker* controls the decision here, and accordingly the judgment in this cause is affirmed (R 67).

Judgment of the United States Court of Appeals for the Seventh Circuit (R 67-68).

Order denying Petition for Rehearing dated September 14, 1962 (R 68).

Order of the Supreme Court of the United States allowing Certiorari filed December 17, 1962. (R 68).

SUMMARY OF ARGUMENT.

(Explanatory Remarks.)

Since the United States Court of Appeals for the Seventh Circuit affirmed the judgment for reasons given in *United States* v. *Malcolm Lebert Parker,* No. 13585, which case is now on Certiorari before this court as No. 516, when reference is made to the Court of Appeals opinion, we shall refer to it as it is printed in *United States* v. *Parker,* No. 516. To distinguish such reference the same will be denoted thus: (Parker R .....)

I.

The Court of Appeals misread and misinterpreted the holding of this Court in *Dickinson* v. *United States,* 346 U.S. 389, 74 S. Ct. 152. Petitioner claimed that having established *prima facie,* that he was entitled to a full conscientious objector classification, exempting him from both combatant and non-combatant service (1-O) and his sincerity in making his claim never having been questioned, he was entitled to such 1-O classification in ab-

sence of evidence in the record contrary to his claim. The Court of Appeals ruled against petitioners contention by holding that the *Dickinson* case is inapplicable here because that holding applies only to persons claiming ministerial status, a matter to be decided on objective facts.

The interpretation of the Court of Appeals of the *Dickinson* case is erroneous in face of other holdings of this Court and the holdings of various other Circuits of the United States Court of Appeals.

II.

It was error on the part of the Court of Appeals to hold that the Hearing Officer of the Department of Justice found anything in the absence of the Hearing Officer's report. This holding is particularly grievous because the trial court refused to order the government to produce the Hearing Officer's report notwithstanding petitioner's offer of proof which contradicted substantially all statements contained in the Department of Justice's recommendation (Exh 18 (SR 55-69)) referring to the alleged Hearing Officer's report.

The Court of Appeals erred in holding on the basis of the "secret" Hearing Officer's report that petitioner chose, merely as a preference and not as a religious belief, to refuse to manufacture munitions in face of the petitioner's offer of proof rejected by the Trial Court that he would not, because of his religious training, manufacture anything used for destructive purposes. The Court of Appeals erred to the prejudice of the petitioner when it relied on the "secret" Hearing Officer's report as a basis in fact to support the classification given to petitioner, *United States* v. *Wilson*, 215 F. 2d 443, *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403, *Batterton* v. *United States*, 260 F. 2d 233.

III.

The rejected offer of proof on behalf of petitioner's witness, Hagerman (R 30) and petitioner's own offer of proof (R 38-41, 43, 44) and Government's own Exhibit B-29 (SR 63), was undenied and undeniably showed bias of the Local Board and showed a disregard of the law by that Board. Nevertheless, the Court of Appeals held that since the Appeal Board provides a *de novo* proceeding, there is no showing that the prejudice of the Local Board, if any "corrupted the decision of the Appeal Board". This holding of the Court of Appeals is clearly erroneous because petitioner was entitled to a fair and unbiased consideration on every step of the proceedings. The error of the Court of Appeals is compounded because both the Local Board and the Hearing Officer who saw petitioner face to face were convinced of petitioner's sincerity in making his claim (Exh B-17 (SR 53); Exh B-18 (SR 55); Exh B-36 (SR 64), while the Appeal Board had no such opportunity to face petitioner. Its *de novo* proceedings were based solely on documentary evidence.

It was further error to rely on Government's Exhibit B-36 (SR 69), which was not only attempted to be contradicted by petitioner's various offers of proof, but also by his request for an order to produce the Hearing Officer's report and by the Government's own Exhibit B-39 (SR 73). *Sicurella* v. *United States*, 348 U.S. 385; 75 S. Ct. 403.

IV.

The Court of Appeals in accepting the statements contained in the Department of Justice's recommendation to the Appeal Board (Exh B-18 & 36) (SR 55 & 69) as gospel truth notwithstanding of the repeated attempts

on the part of petitioner to show that the recommendations were based on falsehoods, departed from the basic tenet of the Anglo-Saxon law which teaches that one charged with a crime (even when the alleged crime is based on one's religious teaching and belief) must be found guilty beyond a reasonable doubt. The Court of Appeals, contrary to that teaching, deprived petitioner of the benefit of this Court's holding in *Sicurella v. United States*, 348 U.S. 385, 75 S.Ct. 403, and of the benefit of *Batterton* v. *United States*, 260 F. 2d 233.

V.

If it is error to submit the Selective Service file to go to the jury, as the Court of Appeals held, such error is not eliminated by the fact that the jury was permitted to hear oral evidence as to the substance of the contents of that file. The Court of Appeals erred when it held that no prejudice resulted to petitioner. The error was the more prejudicial because petitioner was not permitted by the Trial Court to explain some of the matters, contained in the file which went before the jury and he was not permitted to show which part of the file prepared by him contradicted other documents in the file, *Cox* v. *United States*, 332 U.S. 442; 68 S. Ct. 115, *Smith* v. *United* States, 157 F. 2d 176.

VI.

The Court of Appeals erred to the prejudice of petitioner when it held that the Trial Court's refusal to order the production of Department of Justice's Hearing Officer's second report was no error. The Court of Appeals erred because in the instant case the Hearing Officer's report was crucial to prove or disprove petitioner's claim that the Department of Justice's recommendation to the Appeal Board (Exhibit B-36 (SR 69) was false, *Gonzales* v. *United States*, 364 U.S. 59, 80 S. Ct. 1554.

ARGUMENT.

I.

THE COURT OF APPEALS MISREAD THIS COURT'S DECISION IN DICKINSON v. UNITED STATES, 346 U.S. 389, 74 S. Ct. 152, AND THEREBY DEPRIVED PETITIONER OF THE BENEFIT OF THAT HOLDING.

In the opinion of the Court of Appeals (Parker R 60 to 66), *Witmer* v. *United States*, 348 U.S. 375, 75 S. Ct. 392 is cited to the effect that "in that case, the Court interpreted *Dickinson* to hold that there was no basis in fact for the classification because there was no evidence, 'incompatible with' *Dickinson's* proof, to rebut his prima facie case, made out by objective facts". The Court of Appeals looks upon the 'objective facts' as the determinant in this Court's holding in the *Dickinson* case, and therefore, it says "that distinguished Witmer's case from Dickinson's and distinguishes Harshman's. In *Witmer* and here, the question cannot be determined on objective facts such as Dickinson's which involved ministerial status". That such narrow interpretation cannot be foisted upon *Dickinson* is clear because this Court in that case relied on *Estep* v. *United States*, 327 U. S. 114, 66 S. Ct. 423, when it quoted therefrom to the effect that ". . . the question of jurisdiction of the Local Board is reached only if there is no basis in fact for the classification which it gave the registrant" (on page 156). The dissenting opinion of Justice Jackson (joined by Justices Burton and Minton) says that "This Court held in *Estep* v. *United States*, 327 U.S. 114, 66 S. Ct. 423, 427, 90 L. Ed. 567, that in a criminal prosecution under § 11 of the Selective Service Act, the Court must

allow the registrant to prove his local draft board acted without jurisdiction in classifying him for service".

Reading the *Dickinson* and *Estep* cases, it is patently clear that the restriction placed by the Court of Appeals for the 7th Circuit in the *Dickinson* case cannot be upheld. Nowhere in the *Dickinson* case did this Court say (nor did any other Court of Appeals as far as our research discloses) that the *prima facie* case made out by a registrant may be disregarded by the Board *except* when one claims ministerial classification, even though the record discloses no *basis in fact* that is contrary to the registrant's claim. But that is exactly what the Court of Appeals held when it said (Parker R 63) "Once *Dickinson's* status was determined prima facie, the Government was required to produce a basis in fact on which the Court could decide his claims were not as stated. In Harshman's case the question is whether there is affirmative evidence produced by the Government that he has not painted a complete or accurate picture, *Witmer* v. *United States*, 348 U. S. 375, 382 (1955)." The juxtaposition of the above two sentences in the Court of Appeals' opinion indicates clearly that that Court applies the teaching of the *Dickinson's* decision of this Court solely to those who claim ministerial exemption and then if a *prima facie* case is established by such minister to the exemption, then the Government is required to produce a *basis in fact* contrary to his claim. But not so in the case of this petitioner, because in his case, the Court looks to affirmative evidence that proves that he has not "painted a complete or accurate picture". While it is difficult and probably impossible to fathom the distinction between the content of the term "a basis in fact" and the content of the term "affirmative evidence", nevertheless, it is clear that

the Court of Appeals did restrict the *Dickinson* holding and distinguished that case in disfavor of petitioner.

The Court of Appeals also relies on its own holding in *United States* v. *Simmons* (*Seventh Circuit*), 213 F. 2d 901, (reversed by this Court on other grounds, 348 U.S. 397) and quotes from *Witmer* v. *United States*, 348 U.S. 375, to the effect that "'When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption', court may not inquire further as to the correctness of Board's order". Petitioner submits that this Court in the *Witmer* case spoke of legal evidence and not something or anything which may be in the record. This Court did not hold in that case, or in any other case for that matter, that it is sufficient for the Government in a Selective Service case to present a letter from the Department of Justice directed to the Appeal Board and look upon the statements therein contained as evidence satisfying the *Witmer* holding, particularly not when as here, petitioner challenged the veracity of many of those statements and when he particularly offered proof (after his testimony was suppressed) to contradict many, if not all the statements in the letter from the Department of Justice.

Petitioner submits that this Court's holding in the *Dickinson* case applies not only to those who claim ministerial exemption, but it applies also to those, as petitioner, whose claim can be tested by subjective evaluation, as against the objective evaluation applied to *Dickinson*. The question of sincerity, truthfulness, honesty and integrity may not be measured by mechanical tools, but measured they can be. In fact it was done by the Local Board, which not only did not question petitioner's sincerity, but stated that it believed him to be so. The Hearing Officer of the Department of Justice, again using

subjective evaluation, found him sincere, and these were the two instances where petitioner was face to face to the inquirer. He submits that the teachings of *Dickinson, Sicurella, Simmons* and *Witmer* and on the whole of the record here, there is no *basis in fact* for the Board's denial of his claim to be fully exempt from all military service. There is no *basis in fact* for the Board's classifying him as one to be exempted from combatant service only.

On the record and on the law, petitioner submits that his conviction cannot be upheld.

II.

ON THE RECORD THE SOLE GROUND ON WHICH THE COURTS RULED THAT THERE WAS A BASIS IN FACT FOR THE DENIAL OF PETITIONER'S CLAIM FOR EXEMPTION FROM ALL MILITARY SERVICE WAS THE INCIDENT THAT HE WAS EMPLOYED IN A CANDY FACTORY AS A SALESMAN, A SMALL PART OF THE PRODUCTS OF WHICH FACTORY WERE PURCHASED BY THE ARMED FORCES. THIS RULING OF THE COURTS BELOW WAS ERRONEOUS.

The Government introduced into evidence, from petitioner's Selective Service file a letter (Exhibit B-36) (SR 69) that was written by the Department of Justice to the Appeal Board as its recommendation concerning petitioner's classification (R 11, 12). This Exhibit refers to petitioner's appearance before the Hearing Officer appointed by the Department, and states that officer "was impressed with registrant's attitude during the course of the hearing". He concluded "that the registrant is a sincere and conscientious member of his faith." The Government also introduced into evidence as its Exhibit B-27, which shows that the Local Board

similarly found petitioner to be sincere and honest, and that he is a good member of his Church. We may assume that the Court of Appeals followed the holding of this Court in the *Dickinson* case, and particularly that it had before it Justice Jackson's dissenting opinion. That dissent holds that "The board must find and record affirmative evidence that he has misrepresented the case—evidence which is then put to the test of substantiality by the courts. In short, the board must build a record". We may so assume that the Court of Appeals did just that, because it is said on page 3 of the opinion (Parker R. 62):

> "The Department of Justice hearing officer on Harshman's appeal to the Appeal Board found that Harshman worked for Community Industries, a Harshmanite enterprise, which produced WAC uniforms, candy for army ration, valves used on naval vessels, and other items usable in war; that Harshman did not consider it immoral or a violation of his Christian duty to manufacture ammunition; that Harshman viewed the Harshmanite 'reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of reference'; and that Harshman subscribed to the beliefs and opinions of the Harshmanites."

If the above paragraph sums up the record which the board built, then we say that such cannot be considered a *basis in fact* on which to classify petitioner contrary to his *prima facie* established case. It cannot be so held because the above summary of the Court of Appeals is taken not from the record, but from the letter of the Department of Justice (Exhibit 18 & 36), (SR 55 & 69) which was challenged by petitioner during his trial as to its factuality and veracity.

The Court of Appeals held that the Hearing Officer found certain facts. This is a misstatement, because the Court of Appeals cannot know what the Hearing Officer found because the Trial Court refused to order his second report into Court, even though the same Trial Court admitted into evidence the Department of Justice's letter (Exhibit B-36) (SR 69) which was challenged by petitioner as to that portion of it which referred to the Hearing Officer's report.

There is a further misstatement in the Court of Appeals summary quoted above, since the Community Industries employing the petitioner is *not a Harshmanite enterprise*, but it is a simple Illinois corporation owned by the stockholders. The Court of Appeals is further misled by the Department of Justice's letter (Exhibit B-18 & 36) (SR 55 & 69), when it held that petitioner's employing company "manufactured WAC uniforms." There is not one word of evidence in the record that such is the case, and the only source that the Court of Appeals had was the challenged letter of the Department of Justice. The Court of Appeals was further misled when it held that the employing company produced "materiel (*sic*) for military consumption." This is again taken from the Government's Exhibit B-36 (SR 69), the veracity of which was so clearly challenged by petitioner (R 23, 29, 30, 37, 38).

The only evidence as to the kind of goods purchased by the government from the petitioner's employing company is the rejected offer of proof of his witness, Hagerman (R 30-31) and the similarly rejected offer of proof of petitioner (R 38 to 41).

There is a further statement in the Court of Appeals' opinion which is difficult to contradict when it says that

Community Industries produced "other items usable in war." We are hard put to think of anything produced that war could not consume, be it bread, oyster forks to be used in officer messes, medicine to be used in military hospitals, bandages, etc. However, petitioner submits that such a general statement may not be considered as a basis for his disqualification as a conscientious objector.

The Court of Appeals also found that petitioner

> "did not consider it immoral or a violation of his Christian duty to manufacture ammunition; that Harshman viewed the Harshmanite 'reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;' and that Harshman subscribed to the beliefs and opinions of the Harshmanites."

Such a holding is not bottomed on any other part of the record but upon the contradicted statement of the Department of Justice (Exhibit B-18 & 36) (SR 55 & 69). Otherwise, the record is wholly to the contrary, because a defense witness who is the assistant pastor of the Church of Jesus Christ stated that "Community Industries never manufactured any war goods" (R 30). This witness' testimony was in direct contradiction to the statement contained in Exhibit B-36 (SR 69), which says that petitioner's "employment with a concern producing materiel (*sic*) for military consumption" (SR 70) negated his claim of exemption. While the testimony was in the form of an offer of proof that was rejected because of the objection of the government (R 30-31) however, the government counsel offered to have this witness testify in accordance with his offer of proof and thus "give the government an opportunity for cross examination outside the presence (*sic*) of the jury" (R 31). The trial court however, saw no purpose in such examination and held that

It is not "necessary to have the answers to the questions where the questions themselves are palpably questionable" (R 32). The trial court said that it is

> "not going to let some outside witness, for example, the witness now on the stand by extraneous statements, determine whether there is a basis in fact" (R. 32).

However, the offer of proof, albeit rejected, was in direct contradiction of Government's Exhibits 18 and 36 (SR 55 and 69) in that he, holding an office of honor in the Church of Jesus Christ (R 25) and having been connected with the Community Industries Ltd. for 15 years, at the present, Executive Vice President and Treasurer (R 28-29) knows that

> "Community Industries never manufactured any war goods but all manufactured items were for civilian purposes; that it is true that candy could be and was used by the government for survival kits; it is true that some of the dresses that the factory manufactured were purchased by the government for one or the other services; it is possible, while he has no information about it, that some of the garden tractors or some of the snow removal tractors which were sold to distributors throughout the country may have been purchased by the government. He would have testified that none of these items were manufactured by the church directly or indirectly. . . . he understands the teachings of the church . . . no member of the church in good standing would ever manufacture any items which can be used solely for destructive purposes . . ." (R 30).

The above offer of proof fairly contradicts, if not destroys, the basis of the Court of Appeals' holding as to petitioner's " 'reluctance to manufacture munitions • • • not [as] a matter of religious belief, but merely a matter of preference,' and that Harshman subscribed to the beliefs and opinions of the Harshmanites."

Petitioner was just as positive in testifying or attempting to do so contrary to the holdings of the Court of Appeals. In that, he offered proof to the effect that it is NOT TRUE

> "that the Hearing Officer in 1954 concluded that in view of his employment with a concern producing material for military consumption he failed to sustain his claim with respect to non-combatant service; that his letter (*i.e.* Exhibit B-18 SR 55) is false when it states that the Department of Justice concurred with the Hearing Officer's recommendation that the registrant be granted a 1-A-O classification, but, to the contrary, the Hearing Officer accepted in that prior report the recommendation of the Justice Department that no member of the Harshmanite church or the Church of Jesus Christ can be given 1-O classification
>
> . . . that Mr. T. Oscar Smith's letter is false in the respect that it states that the defendant expressed an opinion or made a statement to the effect that he is not committing a violation of his Christian belief to manufacture goods for military consumption; . . . the company where he was employed for the past 8 years never manufactured anything other than material for civilian consumption although some of it, a small part of it, may be purchased by the government.
>
> . . . that he would under no circumstances, engage in the manufacture of any war materials . . . because that would be contrary to his belief and it would be clearly contrary to his mission on this earth . . . the church is a spiritual organization which never owned and does not now own a manufacturing establishment; that manufacturing establishment which employs him is an Illinois corporation which is owned by the stockholders and this manufacturing establishment as he observed in the last 8 years never manufactured any war goods, but was engaged solely in the manufacture of civilian goods.

> During the last 4 years while he was engaged as a salesman he personally never sold any of the candy to any of the military authorities or to the government . . . he believes that he and other church members do owe the government any service that it might demand that does not involve personal participation in the act of war . . ." (R 38 to 40)

Such employment cannot and ought not be considered a basis in fact for the board's denial of his prima facie established claim for 1-O classification. Nor can his employment as a salesman for a candy factory be considered a basis in fact for the board's classifying him as 1A-O, contrary to his claim for full exemption based on his religious training and belief. Petitioner admits that some of the candy which he was handling as salesman may have been purchased by the Government. Nevertheless, he says that even then his employment is not basis in fact as that term was considered by this Court in *Dickinson, Sicurella, Witmer* and *Gonzales* and other cases wherein the term became material.

It appears to the Petitioner that this Court's distinction between wars and theocratic wars is apropos here and it requires just a logical paraphrasing to support Petitioner's contention. This Court said that a draftee's willingness to fight at Armageddon does not indicate his willingness to participate in war because:

> "Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets. We believe the reasoning of the Government in denying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law." *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403, 406.

The Government's evidence, Exhibit B-18 & 36 (SR 55 & 69)—so heavily relied on by the Court of Appeals, even though it is an *ex parte* document—shows that Petitioner and other members of the Church of Jesus Christ of Sullivan, Illinois are "strangers in the land"—if not of the Philistines,—then that of the people of Sullivan. It is clear that even though strangers they be, they must find work so that they may live; however, their religious training requires them to labor in accordance with their own beliefs. The Community Industries gives them that opportunity and possibility. To deprive Petitioner of his *prima facie* established claim to exemption from all military service because he was so employed, would be to say to him that he must choose between starving or forfeiting his right to follow his conscience.

The Court of Appeals for the Seventh Circuit itself held that such choice cannot be exacted even from a conscientious objector when it decided *U.S.* v. *Wilson*, 215 F. 2d 443, wherein Wilson:

> "When asked a hypothetical question as to whether he could continue his job, *i.e.*, as a railroad telegraph operator, if he knew that the trains operated by the railroad were carrying troops to combat service, he stated that he would do so unless the battle front was near his place of employment. When asked how, as a part of his job, he could assist in the routing and scheduling of trains carrying troops to the west coast for overseas combat duty, he stated that so long as he was not told directly that such was their destination he could see no relation between his job and the war effort. He stated finally that there was no capacity in which he could serve so long as it required wearing the uniform of the United States."

The Court, disagreeing with the Government's contention that such employment disqualifies Wilson as a conscientious objector held that:

"Neither do we think the defendant's employment as a railroad telegraph operator was in any way inconsistent with his claim to exemption as a conscientious objector. Section 6(j) of the Act, 50 U.S. C.A. App. Sec. 456(j), provides exemption for persons conscientiously opposed to 'participation in war in any form.' *It would be wholly unrealistic to construe this langauge to mean that a person whose civilian employment indirectly contributed to the war effort could not, therefore, meet the statutory test for exemption.* Such a construction of the Act would completely nullify the provisions granting exemption to conscientious objectors, for *it is difficult to conceive of any gainful activity which in periods of extensive mobilization and training, would not in some manner aid the common purpose.* Moreover, *the Act expressly recognizes that one may engage in civilian work contributing to the national welfare without thereby losing the right to be classified as a conscientious objector.* Section 6(j) provides that persons conscientiously opposed to noncombatant service in the armed forces shall be ordered to perform 'such civilian work contributing to the maintenance of the national health, safety, or interest as may be considered appropriate by the local board.' It is perfectly clear in this case that the nature of the defendant's civilian occupation could not be a basis in fact for denying him the status of a conscientious objector." (Emphasis ours.)

If we juxtapose the decision of the Court of Appeals for the Seventh Circuit in the *Wilson* and in this case, we must conclude that that Court discovered how to dance *pas de deux* by itself. No composer ever thought that one person can take simultaneous steps in opposite directions. The Court of Appeals here was able to do so.

We submit that the Court of Appeals was correct when it decided the *Wilson* case but grievously erred to

the prejudice of the Petitioner in this case. The present holding would make it impossible for any conscientious objector ever to be engaged in any activity which may—however remotely—contribute to the war effort. In fact, a conscientious objector, if the present holding of the Court of Appeals stands, would have to refuse to pay his taxes to the federal government since a large portion of it goes to buy bullets, polaris missiles, hydrogen bombs and other destructive implements of war. This cannot be what Congress had in mind and we are hopeful that this Court will establish clearly by its reversal of the instant case that the law of the land is not as was interpreted by the Court of Appeals.

The pastor of the church wrote to petitioner's Draft Board and the writing was introduced by the government as Exhibit B-3 (SR 28). The pastor's statement, we submit, sums up the problem because,

> "If it is wrong to produce anything which is helpful to the government in time of war then it is wrong to engage in farming at such a time. In fact, logic would force one at such a time to refuse to engage in any constructive effort. . . ."

Petitioner submits that this Court should declare that his and other innocuous employments, even though helpful to the government, is no basis in fact to deprive one of conscientious objector classification, who *prima facie* established that he is entitled to it. The judgment of the Court of Appeals ought to be reversed.

III.

THE LOCAL BOARD WHILE RECOGNIZING PETITIONER'S SINCERITY IN CLAIMING EXEMPTION FROM ALL MILITARY SERVICE, REFUSED TO GRANT HIM THE REQUESTED CLASSIFICATION ON ADMITTEDLY ILLEGAL GROUNDS. THE APPEAL BOARD CONSIDERED HIM DE NOVO AND LET THE LOCAL BOARD'S CLASSIFICATION STAND. DID THIS DE NOVO CLASSIFICATION OVERCOME THE LOCAL BOARD'S ILLEGAL CONDUCT AND DID IT MEND THE LACK OF DUE PROCESS?

The government introduced into evidence petitioner's Selective Service file including Exhibit B-11 (SR 45). This exhibit was prepared by him following his personal appearance before the local board (R 36 & 40). He did recapitulate the conversation that he had with the local board members as it transpired the day before and the recapitulation was never challenged by the government (R 41). Petitioner testified that:

> "following my appearance before the draft board I did prepare a summary of the discussion that I had with the board members. The summary is in my file (Exhibit B-11). I remember a draft board member by the name of Clancy. I had a conversation with him during my personal appearance." (R 36)

When petitioner was asked the question what the conversation was with board member Clancy, the government objected and the objection was sustained.

As to his second appearance before the board, the petitioner offered proof to the effect that when he asked a board member what is he to do to receive a 1-O classification the answer was that as far as the board member was concerned "there was no such thing as a conscientious objector opposed to both combatant and non-combatant service." That the acting chairman of the board spoke up at the same hearing that to get the classification of 1-O he would have to leave the country, that the chairman believed on the basis of his own traveling that

the best place for the registrant would be to go to Canada. He further asked the draft board members whether or not they believed in his sincerity as a conscientious objector and they unanimously stated that they certainly did. (R 41)

Government Exhibit B-11 (SR 45) gives in more detail petitioner's conversation with his draft board members. Government Exhibit 29 written by petitioner (SR 63-64) again refers to petitioner's conversation with draft board members. According to this the chairman of the board, McNutt, gave the reason

> "that since the board had placed the other members of my church in I-A-O he did not feel that my case should be made the exception."

Also, Mr. Saxton, a member of the board stated "other boys in Sullivan had to serve two years and he did not see why we thought we could get out of it." Mr. McNutt further stated that he did not feel that he should send other boys and let us stay home, as he put it."

Petitioner argued before the Court of Appeals that such reasoning and the resultant classification based on such reasoning clearly indicates that the denial of his 1-O classification, theretofore prima facie established, was based neither on law nor on the rules and regulations of Selective Service. However, the Court of Appeals did not even inquire into whether the local board's action was contrary to due process or otherwise in violation of the law because of the alleged *de novo* classification by the Appeal Board. The Court of Appeals said on this point (Parker R 64) that:

> "The Local Board clerk testified that the Board 'felt they were doing their best to acknowledge the registrant's religion * * *' and thus, according to

> Harshman, showed that emotion rather than the law permeated the Local Board proceeding. The only relevant issue before us in this case is the classification of the Appeal Board in its independent, *de novo* proceeding. This proceeding superseded the Local Board's hearing because there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board. *United States* v. *Van Hook*, 7 Cir., 284 F. 2d 489, reversed and remanded for resentencing, 365 U.S. 609 (1961" Parker R 64).

We have no quarrel with the holding that the Appeal Board's classification superseded that of the local board; however, we respectfully disagree with the holding of the Court of Appeals that

> ". . . there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board. . . ."

There is no denial, as there cannot be, that the local board denied his claim to 1-O classification on some extraordinary nonlegal grounds. The Appeal Board that did not have a chance to see him, nor had a chance to talk to him, classified him *de novo*, but *mirabile dictu* left him in the selfsame classification that was given to him by the local board. However, can it be gainsaid that the clearly expressed bias and prejudice of the local board carried over to and was made its own by the Appeal Board and in consequence, the so-called classification *de novo* was but a sham and nothing more.

Petitioner also submits that the Department of Justice's recommendation, brimming with false statements, did influence the Appeal Board to his great prejudice. Petitioner attempted to testify in detail as to the falsehoods contained in Government's Exhibit B-18 and 36 (SR 55 and 69) and when his testimony was not admitted

because of government's objection (R 36), he made an offer of proof as to the falsehoods contained in the Department of Justice's recommendation B-18 and 36 (R 38 and 44).

In Government's Exhibit B-19 (SR 73-76) he challenged at least in part the statements made by the Department of Justice in Exhibit B-36 (SR 69-72).

The Court of Appeals seemed to have adopted the argument presented by the Government that since Harshman did not contradict the Government's Exhibit B-36 (SR 69) point by point, thereby he is precluded from challenging it in toto, at the time of his trial. Petitioner does not believe that this Court will hold him to such strict limitation, knowing that he is not tutored in law and only finished high school (R 35). He believes that the court will not hold him to that strict rule since he was not and could not have been prepared to comply with the strict rules of legal procedure. He was working as a salesman and when he was confronted with the need of answering Government's Exhibit 36 (SR 69) he was 20 years of age (R 32 and SR 39).

In *Conley* v. *Gibson*, 335 U.S. 41, 78 S.Ct. 99, this Court said:

> "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Query: If one misstep by counsel may not do away with a proper decision on the merits, how can a misstep by this untutored petitioner be held against him to the extent that his case be not judged on the merits.

This Court answered this question just recently when in *Foman* v. *Davis*, 83 S.Ct. 227 (1962) it said:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley* v. *Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1."

In footnote No. 5 of *Simmons* v. *United States*, 348 U.S. 397, 75 S.Ct. 397 on page 401, this Court held that:

> "Registrants are not to be treated as though they were engaged in formal litigation assisted by counsel. *United States ex rel. Berman* v. *Craig*, 3 Cir., 207 F.2d 888; *Smith* v. *United States*, 4 Cir., 157 F.2d 176."

Petitioner submits his hope, bolstered by the prior decisions of this Court, that the judgment against him will not be permitted to stand because the same is bottomed not on evidence, but rather on guesses on the part of the Court of Appeals and further because there is the red thread of bias and prejudice entwined throughout the proceedings. He was deprived of the due process of law when the court speculated and guessed that the bias of the draft board (if any) "may not" have prejudiced him at all. Not to reverse the judgment of the Court of Appeals for the Seventh Circuit would be tantamount to speculate and guess petitioner into the penitentiary. Petitioner believes that this Court will not permit that to happen therefore, he asks that the judgment of the Court of Appeals be reversed.

IV.

THE TRIAL COURT ERRED TO THE GREAT PREJUDICE OF PETITIONER WHEN IT RULED THAT HE MAY NOT PRESENT EVIDENCE WHICH ATTEMPTED TO OVERCOME THE GOVERNMENT'S EX PARTE STATEMENT ALLEGING THAT HIS EMPLOYING COMPANY WAS MANUFACTURING IMPLEMENTS OF WAR. THE COURT OF APPEALS UPHOLDING THE TRIAL COURT ERRED SIMILARLY.

The opinion of the Court of Appeals for the Seventh Circuit holds (Parker-R 63) that:

> "Harshman also relies upon *Batterton* v. *United States*, 8 Cir., 260 F.2d 233 (1958), which is not in his favor on the facts before us. And each case must 'of necessity be based on the particular beliefs of the individual.' *Sicurella* v. *United States*, 348 U.S. 385, 390 (1955). The court there said the record 'does not even by indirection,' deny Sicurella's sincere religious beliefs. Harshman argues the record here as to him is like that record as to Sicurella. But Sicurella's sincerity was admitted and the court said 'we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity.' p. 388."

The above must be read to the effect that while Sicurella's sincerity was admitted Harshman's was not, even though the record is just to the contrary. The record shows that in those two instances where petitioner had the privilege of a personal appearance, that is before the Local Board and before the Hearing Officer of the Department of Justice, there was a positive finding that he was sincere. These two findings never were challenged or contradicted in any part of the record. Therefore, petitioner submits that the teaching of the *Sicurella* case applies to him, since his sincere religious beliefs were not

denied "not even by indirection", just as there was no such denial in the *Sicurella* case.

The Court of Appeals (Parker R 63) sees

> ". . . no inconsistency in the Department of Justice and the Board recognizing Harshman's sincerity of religious belief and the classification based on the admitted fact of his willingness to participate in the production of war goods."

Petitioner protests, as he protested before the Court of Appeals, that there was never any admission on his part but to the contrary, he claimed and attempted to show that it was NOT A FACT and that he was NOT WILLING to produce war goods. Where did the Court of Appeals find such alleged "admitted facts". The opinion of the Court of Appeals gives us the answer because it states (Parker-R 63) that:

> "The Department of Justice recommendation discloses Harshman's view that 'it would not be considered immoral or a violation of their Christian duty to manufacture ammunitions * * *.' This fact would suffice to rebut Harshman's prima facie showing."

So it is as petitioner repeatedly claimed, nothing but the *ex parte* recommendation emanating from the Department of Justice which discloses what the Court of Appeals pleases to call "admitted facts." It's strange, because it is contrary to every precept of criminal procedure and theory underlying it in our jurisprudence, to permit the prosecution to present an *ex parte* statement which allegedly discloses the "view of the accused." It is strange because it is contrary to all precepts that we know of, to accept such *ex parte* statement of the prosecution when the defendant attempted to present evidence in contradiction of such prosecution's statement and when his evidence was rejected by the trial court because of government's objec-

tion. The proof by petitioner denying the veracity of the prosecution's *ex parte* statement was similarly rejected. The Court of Appeals seems to be entirely oblivious of petitioner's proffered denial of the truth of the "Department of Justice recommendation" and therefore, one wonders what are the facts remaining which the Court of Appeals held to "suffice to rebut Harshman's prima facie showing."

The opinion of the Court of Appeals is a haunting one because there is a "leitmotiv" therein which perforce, reminds one of Aesop's Fables (with due apologies where apologies are due). One is reminded of Aesop's little lamb who was accused by the wolf of having disturbed the wolf's drinking water in the flowing river. The fact that the lamb was drinking below the wolf was for naught, because it may have been the lamb's brother who did the thing charged against the poor little lamb. The fact that the little lamb had no brother was held for naught, because no argument of his was to be considered since the wolf had the strength to make his accusation stick, however baseless those accusations were.

The haunting picture does not disappear, but to the contrary, it comes into strong relief when the Court of Appeals for the Seventh Circuit holds that the Department of Justice recommendation submitted *ex parte* and attempted to be contradicted by petitioner nevertheless is considered to be "fact (which) would suffice to rebut Harshman's *prima facie* showing."

Petitioner submits that the Court of Appeals should have inquired why the true facts as to the content of his religious belief were not permitted by the trial court to be disclosed. Why, when he challenged the Department of Justice recommendation and when in support of his challenge he asked

for an order to produce the Hearing Officer's report, did the prosecution object and was the objection sustained? (R 22, 23). Petitioner earnestly says that it was a prejudicial error and a grave one at that for the trial court to limit the testimony of his witness, Hagerman (R 25), and it was a further grave error to reject the offer of proof submitted on behalf of this witness (R 30). It was error to prevent petitioner from testifying in rebuttal of the allegations of the Department of Justice recommendation (Exhibit B-36, SR 69) and it was a further error to reject his offer of proof which unambiguously and head-on challenged the statement of the Department of Justice (R 38). That it was prejudicially erroneous on the trial court's part to prevent petitioner from presenting such testimony is clearly shown by the fact that the Court of Appeals was misled because of the absence of such testimony and accepted "non-facts" as "facts", as in George Orwell's "1984" "newspeak" permits peace to be equated with war, honor with dishonor, etc. Petitioner submits that the Court of Appeals erred when it held (Parker-R 63) that unsubstantiated evidence presented by the government *ex parte* in the form of the recommendation of the Department of Justice (B-36, SR 69) did overcome and rebut his prima facie showing. However, the petitioner calls this Court's attention to that sentence in the Court of Appeals opinion where it is said that "this fact would suffice to rebut Harshman's prima facie showing." This sentence clearly indicates, whether by inadvertence or otherwise, that the Court of Appeals admitted that petitioner made a "prima facie showing" as to his claim to full exemption from military service (1-O) and therefore, he does not feel it necessary to belabor the point of his *prima facie* case. He will not belabor the absence of basis in fact because he believes that he has shown

that no basis in fact exists which would justify the denial of his *prima facie* established claim to 1-O classification and he submits therefore that the judgment of the Court of Appeals for the Seventh Circuit upholding the judgment of trial court ought to be reversed.

V.

THE SENDING OF THE SELECTIVE SERVICE FILE TO THE JURYROOM WAS AN ERROR PARTICULARLY BECAUSE THE TRIAL COURT PREVENTED PETITIONER FROM EXPLAINING THE CONTENT THEREOF.

Petitioner complained before the Court of Appeals for the Seventh Circuit that he was prejudiced by the trial court's ruling pursuant to which he was prevented from testifying about certain documents in his Selective Service file while the trial court permitted the jury to have the file before it.

In reviewing this matter the Court of Appeals said that the trial court

> ". . . erred in permitting the S.S.S. file to go to the jury, for, as the court in *Cox* said, ' * * * nothing in the file is pertinent to any issue proper for jury consideration.' But we see no prejudice from this fact since the jury had already heard oral testimony of the substance of its contents." (Parker R 65).

Petitioner submits that the logic or illogic of the above holding is not the law, particularly not because it was the prosecution which introduced on oral testimony the contents of the Selective Service file and to boot, over the strenuous objection of petitioner (R 11 and 12). Petitioner believes and so submits that the trial court erred when thereafter, because the objection of the government prevented his witness, Hagerman (R. 25) to testify about the selfsame documents which were so introduced by the

government (R 36 and 37). Certainly, petitioner should have been given the opportunity to explain what was within the file after the court, in front of the jury, admitted the file into evidence (R 12). It seems that the Court of Appeals believes that the ADMITTED ERROR of sending the file to the jury was remedied because the jury was permitted to learn about the file by oral testimony too. Petitioner believes that this compounds the error because if the jury had no business to peruse the Selective Service file it had no business to hear oral testimony concerning it.

The Court of Appeals sees no prejudice resulting from the jury seeing the file. The "eye of vigilance" of the Court of Appeals does not reach far enough because it is impossible to fathom how much the jury's mind was influenced by the voluminous Selective Service file before it. Petitioner believes that the jury had to be influenced against him when the file was sent out for its inspection and particularly after it heard the court's ruling that petitioner may not testify about the file nor was he permitted to explain the contradictory documents in it. Such a ruling did undoubtedly convince the jury that the weighty documents are sacrosanct, and pursuant thereof, the petitioner perforce had to be found guilty.

Petitioner argued before the Court of Appeals and argues now that the sending of the files to the jury gravely prejudiced him. The prejudice resulted from a pyramiding of the trial Court's erroneous ruling. Firstly, the jury heard oral testimony about the Department of Justice recommendation to the Appeal Board (B-36, SR 69-72) however, he was not permitted to present testimony that such exhibit contained many misstatements, falsehoods, particularly with reference to what petitioner allegedly said to the Hearing Officer of the Department of Justice and what such Hearing Officer said to him (R 37). Sec-

ondly, the jury was permitted to hear testimony and was given the opportunity to see Government's Exhibit B-39 (SR. 73) however, petitioner was not permitted to give testimony what, in his remembrance, the actual conversation was between him and the draft board. Petitioner submits that such and other similar rulings of the trial court pertaining to the Selective Services file could not but prejudice the jury against him and the Court of Appeals is in error when it was unable to see such resulting prejudice.

Petitioner recognizes that the trial court attempted, by its instructions, to make it clear to the jury that the classification given to him is not before it, however, there was never any explanation given to the jury what it ought to do with the file. Was it to be expected that the jury is going to peruse the file but it will close its eyes when it came to the matter of classification. How can that be done by the jury or anyone else, since the whole of the file pertains to petitioner's classification and to nothing else. We believe that the jury did consider the classification and therefore, the file before it resulted in grave prejudice to him as it was said by this Court in *Cox* v. *United States*, 332 U.S. 442 (1947) 457, 68 S.Ct. 115. In that case this Court, in footnote No. 4 refers to *Smith* v. *United States*, (4th Cir.) 157 F.2d 176. In the *Smith* case the Court of Appeals for the Fourth Circuit, according to the footnote

> "held that the submission of the issue of classification to the jury constituted reversible error."

Because this Court so quoted *Smith* v. *United States* with approval, petitioner submits that on the ground that the jury had the Selective Service before it, the judgment of the Court of Appeals for the Seventh Circuit ought to be reversed.

VI.

PETITIONER WAS PREJUDICED BY THE TRIAL COURT'S REFUSAL TO ORDER THE GOVERNMENT TO PRODUCE THE HEARING OFFICER'S REPORT WHEN SUCH REPORT WAS REFERRED TO IN A GOVERNMENT EXHIBIT IN EVIDENCE AND WHEN THE TRUTHFULNESS OF SUCH EXHIBIT WITH REFERENCE TO THE HEARING OFFICER'S REPORT WAS CHALLENGED BEFORE THE TRIAL COURT.

The government introduced into evidence Exhibit B-36 (SR 69), the letter sent by the Department of Justice to the Appeal Board which concludes that

> ". . . he recommended that registrant (meaning the petitioner) be granted a 1-A-O classification." (SR 71)

This exhibit begins with reference to Section 6 (j) of the Universal Military Training and Service Act pursuant to which

> ". . . an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant (i.e. petitioner) by Mr. F. M. Brittingham, a Hearing Officer for the Department of Justice." (SR 69).

The same exhibit then underlines that

> "The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Résumé of the Inquiry attached hereto and made a part hereof."

The Résumé referred to appears as SR 66-68 and makes no mention whatsover what the Hearing Officer reported to the Department of Justice. In the body of Exhibit B-36 (SR 69-72) reference is made to the alleged statements made by petitioner before the Hearing Officer and to the alleged statements of the Hearing Officer to petitioner.

In Government's Exhibit 39 (SR 73-76) petitioner contradicts many of the alleged statements which were imputed to him in Government Exhibit B-36 and those contradictions fully justified his motion for an order upon the government to produce the Hearing Officer's report. The trial court was however, to the contrary opinion and defendant's counsel was not permitted to cross-examine the draft board clerk who testified for the government (when introducing the Selective Service file), and he was not permitted to ask this witness whether the Brittingham report referred to in Government Exhibit B-16 is in the Selective Service file (R 13). Petitioner moved that the government be ordered to produce the Brittingham report but the trial court refused (R 22). When petitioner renewed his motion to produce on the ground that B-36 (SR 69) is not a fair résumé of the Hearing Officer's report and when he again moved for production for the purpose of clarifying the contradictions existing between B-36 and B-39, (both introduced by the government), the motions were denied (R 23).

In the face of the above statement of the record, the holding of the Court of Appeals for the Seventh Circuit is *non sequitur* when it says

> "There was no error in the District Court's ruling which precluded production of the Department of Justice hearing officer's report and no error in denying the motion for acquittal on this ground. Neither the Act nor the regulation, since 1952, requires the report placed in the file. *Gonzales* v. *United States*, 364 U.S. 59 (1960)."

This holding is *non sequitur* because petitioner did not claim that the Hearing Officer's report is to be made part of his Selective Service file irrespective of whether that file was made up before or after 1952. However, he main-

tains that this Court did not hold in *Gonzales* v. *United States*, 364 U.S. 59 as the Court of Appeals seems to read that opinion. To the contrary, in reading the *Gonzales* case of 1960, and applying it to the record here, that case teaches that petitioner's motion to produce the Hearing Officer's report should have been granted. This Court held that:

> "... petitioner has failed to show any particular need for the report and notes. While there are now allegations of the withholding of 'favorable evidence developed at the hearing' and a denial of a 'full and fair hearing,' no such claim was made by petitioner at any stage of the administrative process. Moreover, his testimony at trial never developed any such facts. *In the light of these circumstances*, as well as the fact that the issue at trial in this respect centered entirely on the Department's recommendation, which petitioner repudiated but which both the appeal board and the courts below found supported by the record, we find no relevancy in the hearing officer's report and notes." (page 1557) (emphasis added)

In the *Gonzales* case, petitioner presented no challenge "at any stage of the administrative process" while petitioner did so point-blank when he put into his file Exhibit B-39 (SR 73-76).

In the *Gonzales* case the "testimony at trial never developed any" facts which would have shown the withholding of "favorable evidence developed at the hearing." In the instant case, to the contrary, petitioner developed or attempted to develop testimony to show that "favorable evidence developed at the hearing" before the Hearing Officer was obscured and was denigrated by the Department of Justice report to the appeal board. (R 20, 23, 24, 27, 31, 37). Petitioner submits that in "*the light of these circumstances*" as well as the" facts developed or which could have been developed but for the erroneous ruling

by the trial court, the Hearing Officer's report should have been ordered to be brought into court.

During the trial when petitioner was not permitted to testify, he offered proof (R 38-41) which has shown without peradventure of doubt that Government's Exhibit B-36 (SR 69) with reference to the hearing before the Hearing Officer was false. The offer of proof denied that the Hearing Officer made the statements attributed to him in Government's Exhibit B-36 and denied the statements attributed to petitioner before the Hearing Officer in the selfsame exhibit.

Under the circumstances of this case, the Hearing Officer's report was the very basis for the Department of Justice recommendation (B-36, SR 69). The repudiation of the statements in that exhibit put the Hearing Officer's report clearly in issue and in consequence the relevance and materiality thereof was plainly established. Due process and the requirement of fair hearing made it mandatory for the trial court to order the production of the Hearing Officer's report. Its failure to do so was prejudicial error.

Selective Service regulation 1626.25 (procedure followed by the appeal board) makes it clear that that board should make its determination on the COMPLETE PRESENTATION OF THE FILES. There was no such presentation because while the file contained the Department of Justice recommendation (B-36, SR 69), it contained neither a fair résumé nor the original report of the Hearing Officer. The challenge by petitioner to Exhibit B-36 undoubtedly put him in a prejudicial position before the Appeal Board because there was nothing before that board to prove whether the challenge was justified or not. Because of the hiatus in the record, the Appeal Board was compelled to make a choice and it did make the choice in disfavor of petitioner. The choice was

whether to assume that the Department of Justice recommendation (B-36 SR 69) was a factual and truthful one notwithstanding petitioner's challenge, or whether petitioner was sincere and honest in his challenge notwithstanding the statement contained in Government's Exhibit B-36 which pertained to the Hearing Officer's report. Petitioner says that he was prejudiced and the prejudice can be seen from the fact that the Appeal Board ruled against his claim for full exemption from military service and it undoubtedly did so by concluding that his challenge directed towards Exhibit B-36 was not an honest one and therefore, that board must have further concluded that his sincerity as a whole must be found wanting. The prejudice so created by the trial court's refusal to order production of the Hearing Officer's report was great and irremediable. The prejudice was created by the trial court's refusal to order production of the report and therefore, it must be held that the Court of Appeals for the Seventh Circuit erred when it found "no error in the District Court's ruling which precluded production of the Department of Justice Hearing Officer's report." The judgment of the Court of Appeals ought to be reversed.

CONCLUSION

In *Franks* v. *United States*, 216 F.2d 266, Judge Pope, speaking for the unanimous United States Court of Appeals for the Ninth Circuit, involving an alleged Selective Service law violation, stated a truism that

> "In a criminal prosecution of this kind, the burden is upon the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing upon that validity, (which we will discuss hereafter), then we must view the record in the light most favorable to the appellant as we proceed to construe its meaning."

In the case of *Manke* v. *United States*, 259 F.2d 518, the conviction of Manke, charged with violating the Selective Service Act, was reversed because the court thought:

> ". . . that in view of the entire history of this case as shown by the record, and in view of the fact that the Appeal Board had no new evidence before it adverse to appellant's claim of conscientious objection, it would be unrealistic not to conclude that the Appeal Board, in classifying appellant as 1-A was influenced largely if not wholly by the recommendation of the Department of Justice. *Goetz* v. *United States*, 9 Cir., 216 F.2d 270. Since the recommendation, being made a part of the résumé, was founded on a mistaken assumption of fact we hold that its consideration by the Appeal Board amounted to a denial of procedural due process, and therefore appellant was entitled to a judgment of acquital."

In the case of *Kretchet* v. *United States*, 284 F.2d 561 (1960), the United States Court of Appeals for Ninth Circuit considered the matter "in the light of the teachings in *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403," and quoted therefrom to the effect that

> "The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to *participation* in war."

That test clearly applies to petitioner.

Petitioner submits that the holding of the *Kretchet* case clearly applies to him when in that case the United States Court of Appeals for the Ninth Circuit said:

> "We are unable to determine from the record whether the board, in refusing to sustain appellant's claim for exemption, did so because of appellant's lack of sincerity, or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds, or on two of them. The advice given by the Department of Justice to the appeal board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice."

This Court speaking of the requirements of due process in *Palko* v. *State of Conn.*; 302 U.S. 319, 58 S.Ct. 149, held that:

> "Fundamental too, in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after a fair trial. The hearing, moreover, must be a real one, not a sham or pretense."

Petitioner sorrowfully says that the Department of Justice in prosecuting him and further in submitting a non-factual recommendation to the Appeal Board forgot its motto, *qui pro domina justitia sequitur*. If it did not forget it then it did not apply it in this case because this prosecution was surely not on behalf of justice.

The trial court, petitioner submits, was prejudiced against him as it may be seen from the ruling of that court

when it restricted his defense counsel in his opening statement. The prejudice clearly appears upon the reading of the colloquy between the court and counsel as it appears on R 5 to 8 and again on 9 and 10. Petitioner earnestly suggests to this Court to look upon the Transcript of Record so indicated and also upon the exclusion of petitioner's proffered instructions to the jury which were rejected by the trial court upon the objection of the government. Petitioner particularly complains that the trial court refused to give instructions on bias and prejudice of the Local and of the Appeal Boards. (defense instructions O, P and Q (R 57 and 58)).

Petitioner submits that in line with the holdings of the various Courts of Appeals hereinbefore referred to (except the holding of the Court of Appeals for the Seventh Circuit but including the holding of that court in the *Wilson* case), the judgment of the Court of Appeals for the Seventh Circuit must be reversed because his trial was not in accordance with the concept of due process and because his trial was not fair but simply a sham and pretense of a trial.

> ". . . A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." *Rex* v. *Sussex Justices*, 1 K.B.D. (1924) at 259.

Petitioner submits that in his case justice was not done and it is manifest and on the record undoubted that such is the case. For that reason alone, though there are a great many others heretofore argued, the judgment of

the Court of Appeals for the Seventh Circuit ought to be reversed.

Respectfully submitted,

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APPENDIX.

50 U.S.C. 462; 62 Stat. 622—OFFENSES AND PENALTIES.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-454 and 455-471 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections), rules, regulations, or directions who shall knowingly make, or be a party to the making of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (said sections), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title (said sections), or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title (said sections), or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title (said sections), or rules, regulations, or directions made pursuant to this title (said sections), or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such of-

fenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title (said sections) unless such person has been actually inducted for the training and service prescribed under this title (said sections) or unless he is subject to trial by court martial under laws in force prior to the enactment of this title (June 24, 1948). Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing. . . . . June 24, 1948, c. 625, Title 1, p. 12, 62 Stat. 622.

PART 1622—CLASSIFICATION RULES AND PRINCIPLES

General Principles

1622.1 *General Principles of Classification.*—(a) The Universal Military Training and Service Act, as amended, provides that every male citizen of the United States, every male alien admitted to the United States for permanent residence, and every male alien who has remained in the United States in a status other than that of permanent resident for a period exceeding one year, who is between the ages of 18 years and 6 months and 26 years, shall be liable for training and service in the Armed Forces of the United States, and that persons who on June 19, 1951, were or thereafter are, deferred under the provisions of clause (A) or clause (C) of section 6(c)(2) of such Act shall remain liable for training and service until they attain the age of 28, and that persons who on June 19, 1951, were, or thereafter are, deferred under any other provision of section 6 of such Act shall remain liable for training and service until they

attain the age of 35. Certain exemptions and deferments are specifically provided; others are authorized to be provided by regulations promulgated by the President.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Universal Military Training and Service Act, as amended, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

1622.2 *Classes.*—Each registrant shall be classified in one of the following classes:

CLASS I

Class I-A: Available for military service.

Class 1-A-O: Conscientious objector available for noncombatant military service only.

Class 1-C: Member of the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service.

Class 1-D: Member of reserve component or student taking military training.

Class 1-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.

1622.11 *Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.14 *Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any

form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.16 *Class I-W: Conscientious Objector Performing Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-W shall be placed any registrant who has entered upon and is performing civilian work contributing to the maintenance of the national health, safety, or interest, in accordance with order of the local board.

(b) In Class I-W shall be placed any registrant who subsequent to being ordered by the local board to perform civilian work contributing to the maintenance of the national health, safety, or interest has been released from such work by the local board after satisfactorily performing the work for a period of twenty-four consecutive months or has been sooner released from such work by the Director of Selective Service under the provisions of section 1660.21 of this chapter. Each such registrant shall be identified on all records by following his classification with the abbreviation "Rel." and, upon attaining an age beyond the maximum age of liability for military service under the provisions of the selective service law, all such registrants shall be reclassified in Class V-A.

PROCEDURE FOLLOWED BY APPEAL BOARD

1626.26 *Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall

be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

SECTION 6 (j) OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, 50 U.S.C.A. APPENDIX § 456 (j):

"Nothing contained in this Title (Sections 451-454 and 455-477 of this Appendix) shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, that does not include essentially political, sociological, or philosophical views or a merely personal moral code. • • •"